INTERIOR BOARD OF INDIAN APPEALS

Estate of Tyrrell S. Willcox

43 IBIA 197 (07/31/2006)

United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
801 NORTH QUINCY STREET
SUITE 300
ARLINGTON, VA 22203

ESTATE OF TYRRELL S. WILLCOX	:	Order Affirming Decision
	:	
	:	Docket No. IBIA 04-149
	:	
	:	July 31, 2006

The Shawnee Tribe (Tribe) seeks review of a denial of a petition for rehearing entered on August 10, 2004, in the estate of Tyrrell S. Willcox (Decedent), Loyal Shawnee, Probate No. 001-864-238G-1, by Administrative Law Judge Richard L. Reeh. The denial of rehearing let stand the underlying Order Approving Will and Decree of Distribution entered by Judge Reeh on March 17, 2004. That order approved Decedent's will and ordered that Decedent's fractional interest in trust property in Shawnee Reserve No. 206, located in Johnson County, Kansas, be distributed to the estate of Decedent's non-Indian wife. 1/ For the reasons discussed below, the Interior Board of Indian Appeals (Board) affirms Judge Reeh's decision.

Factual Background

Decedent died on May 19, 1999. Decedent's will devised his entire estate to his non-Indian wife, Mabel Olivia Nelson Willcox, so long as she survived Decedent by sixty days. Mabel Willcox died on December 16, 1999, surviving Decedent by more than sixty days. Decedent had no children.

Judge Reeh conducted a probate hearing on March 3, 2003. At the hearing, an attorney representing the Tribe stated that he wanted "to assert [the Tribe's] claim under 25 USC Section 2205(c) of the Indian Land Consolidation Act." March 3, 2003 Transcript at 9. At the end of the hearing, Judge Reeh gave the Tribe additional time to submit a brief supporting its position.

1/ The Bureau of Indian Affairs inventory for Decedent's trust property indicates that he held an 8800/235293 (0.0374001776) interest in approximately 72 acres within Shawnee Reserve No. 206, located in Sec. 25, T. 12 S., R. 22 E., in Johnson County, Kansas.

On March 14, 2003, Judge Reeh issued an Order Clarifying Issues to be Addressed and Schedule for Submittals, in which he clarified that the Tribe's claim was that the Shawnee Tribe was entitled to purchase Decedent's interest in Shawnee Reserve No. 206, under the Indian Land Consolidation Act (ILCA), 25 U.S.C. § 2205, because Decedent had devised his interest in this property to his non-Indian wife. In the March 14, 2003 order, Judge Reeh also noted that under Kansas law, Decedent's sole heir at law was his wife.

In accordance with the March 14, 2003 order, the Tribe submitted a brief in support of its position that it is entitled under ILCA to acquire Decedent's interest in Shawnee Reserve No. 206. In its brief, the Tribe argued that ILCA, as amended in 2000, authorizes the Shawnee Tribe's acquisition of interests in Shawnee lands that would otherwise be transferred to non-Indians; ILCA is remedial legislation that took effect immediately upon enactment and that must be applied retroactively to pending probates; and ILCA provides relief to non-Indian devisees and heirs because it requires tribes to pay fair market value for the beneficial interests in Indian lands they acquire.

On March 17, 2004, Judge Reeh entered an Order Approving Will and Decree of Distribution. In that order, Judge Reeh approved a will dated April 29, 1999, in which Decedent devised his entire estate to his non-Indian wife, Mabel Willcox. Judge Reeh also rejected the Tribe's argument that it is entitled to purchase Decedent's interest in Shawnee Reserve No. 206 under the ILCA. Judge Reeh explained:

> The Tribe did not argue that it is entitled to receive or purchase decedent's interest in Shawnee #206 because of laws in effect when Tyrrell Willcox died, May 19, 1999. It agreed that Tyrrell Willcox died before the November 7, 2000 amendment of 25 U.S.C. §§ 2201-2206. The Tribe asserted, however, that ILCA amendments of 2000, should be applied retroactively. This position cannot be sustained. Subsection 2206(g)(4) of the amendments provides, "After providing notice under this subsection, the Secretary shall certify that the requirements of this subsection have been met and shall publish notice of such certification in the Federal Register." Subsection [2206(g)] (5) provides, "The provisions of this section shall not apply to the estate of an individual who dies prior to the day that is 365 days after the Secretary makes the certification required under paragraph (4)." * * * To the time of this writing, these amendments have not been implemented because Secretarial certification has not been published. Thus, the ILCA Amendments of 2000 do not apply to this estate.

March 17, 2004 Order at 2 (emphasis in original).

The Tribe filed a petition for rehearing. The Tribe and the heirs of Mabel Willcox, through James W. McCauley, filed briefs. 2/ On August 10, 2004, Judge Reeh issued the order denying rehearing that is the subject of this appeal. In his order, Judge Reeh again rejected the Tribe's argument that ILCA's 2000 amendments, enacted after Decedent's death, apply retroactively and enable the Tribe to purchase Decedent's interest in Shawnee Reserve No. 206. Judge Reeh concluded that ILCA cannot be applied retroactively and that "ILCA's plain language shows a clear Congressional intent that is adverse to the Tribe's position." Order Denying Petition for Rehearing.

The Tribe filed a timely appeal with the Board. The Tribe filed a brief, and the heirs of Mabel Willcox filed a response.

Discussion

The issue in this appeal is whether Decedent's estate is subject to the provision in ILCA, as amended in 2000, that grants tribes a right to purchase trust property that has been devised to a non-Indian. See 25 U.S.C. § 2205(c) (2001). 3/

Congress enacted ILCA in 1983. 4/ The Act's purpose is to reduce or eliminate undivided fractional interests in Indian trust or restricted lands and to facilitate consolidation of tribal landholdings. See 25 U.S.C. § 2203(a). Relevant to this appeal, the 2000 amendments modified section 2205, which had given tribes prospective authority to prohibit devises of interests in trust or restricted land to non-Indians, contingent on the tribe's payment of fair market value for such interests. As amended, subsection 2205(c) provided in relevant part:

2/ The brief filed by James W. McCauley was also filed on behalf of Dennis M. McCauley, Thomas F. McCauley, Elizabeth E. Jacobs, Mary Ann Bry and Susan C. Hodges, all nephews and nieces of Decedent's wife, Mabel Willcox. Through her will, Mabel Willcox had devised a portion of her estate to each of these individuals.

3/ Unless otherwise specified, all future references to 25 U.S.C. are to the 2001 edition.

4/ The statute was amended in 1984, 1991, 2000, 2004 and 2005. At issue in this case is the applicability of the 2000 amendments, the substance of which was not affected by the 2004 and 2005 amendments.

> If the owner of an interest in trust or restricted land devises an interest in such land to a non-Indian under section 2206(a)(6)(A) of this title, the Indian tribe that exercises jurisdiction over the parcel of land involved may acquire such interest by paying to the Secretary [of the Interior] the fair market value of such interest, as determined by the Secretary on the date of the decedent's death.

Section 2206, which governs the descent and distribution of trust or restricted property, was repealed and replaced by the 2000 amendments. As amended in 2000, subsection (a) of section 2206 applied where, as here, an interest in trust or restricted land was devised by a valid will. 5/ Generally, subsection (a) provided that such interest may be devised only to an Indian, and that any devise to a non-Indian automatically creates a life estate with respect to such interest. Subsection (a) also included a special rule that allowed an Indian tribe to acquire an interest in trust or restricted land that had been devised to a non-Indian under subsection 2205(c). Id. § 2206(a)(6)(B). In relevant part, subsection (a) stated:

> (a) Testamentary disposition
>
> (1) In general
>
> Interests in trust or restricted land may be devised only to—
>
> (A) the decedent's Indian spouse or any other Indian person; or
>
> (B) the Indian tribe with jurisdiction over the land so devised.
>
> (2) Life estate
>
> Any devise of an interest in trust or restricted land to a non-Indian shall create a life estate with respect to such interest.
>
> * * * * * * *
>
> (6) Special rule
>
> (A) In general
>
> Notwithstanding paragraph (2), an owner of trust or restricted land who does not have an Indian spouse, Indian lineal descendant, an Indian heir of the first or second degree, or an Indian collateral heir of the first or second degree, may devise

5/ When there was no valid will, subsection 2206(b) provided, in part, that an interest in trust or restricted property would descend "only to a decedent's spouse or heirs of the first or second degree, pursuant to the applicable law of intestate succession." 25 U.S.C. § 2206(b)(1). Subsection (b) also provided that any non-Indian spouse or heir would receive only a life estate. Id. § 2206(b)(2).

> his or her interests in such land to any of the decedent's heirs of the first or second degree or collateral heirs of the first or second degree.
> (B) Acquisition of interest by tribe
> An Indian tribe that exercises jurisdiction over an interest in trust or restricted land described in subparagraph (A) may acquire any interest devised to a non-Indian as provided for in section 2205(c) of this title.

The 2000 amendments to ILCA also modified section 2206 to include requirements that the Secretary provide notice of the amendments to Indian tribes and owners of trust or restricted lands, certify that such notice has been completed, and publish the certification in the Federal Register. See 25 U.S.C. § 2206(g)(1)-(4). Subsection 2206(g)(5) then provided: "The provisions of this section shall not apply to the estate of an individual who dies prior to the day that is 365 days after the Secretary makes the certification required under paragraph (4)." 6/

On appeal, the Tribe acknowledges that Decedent died prior to the 2000 amendments, but argues that in enacting ILCA, Congress intended it to take effect "immediately" and apply to any estate for which probate is still pending. Tribe's Brief at 4. Thus, the Tribe's position is that subsection 2205(c), which gives tribes authority to acquire interests in trust or restricted land devised to a non-Indian, must be applied retroactively to Decedent's estate, even though Decedent died before the 2000 version of subsection 2205(c) was enacted.

In support of its position, the Tribe makes several overlapping arguments that can be distilled into two basic arguments: (1) because subsection 2205(c) does not include an effective date, it must be deemed to have been effective upon enactment, and (2) the policy behind the statute — to prevent the further fractionalization of trust or restricted land — dictates retroactive application of the statute, and that "[c]onstruing 25 U.S.C. § 2205(c) to

---

6/ The amendments in 2004 and 2005 eliminated subsection (g), but added language elsewhere in the statute with the same effect. See 25 U.S.C. § 2201 note (Supp. 2006) (providing that, with exceptions not relevant here, section 2206 "shall not apply to the estate of an individual who dies before the date that is 1 year after the date on which the Secretary makes the certification required under [this statute]").

spring into effect more than four years after enactment completely frustrates congressional intent." Tribe's Brief at 6. 7/

We reject the Tribe's arguments.

The United States Supreme Court has repeatedly stated that the plain language of a statute is the starting point in interpreting the statute. See Ardestani v. Immigration and Naturalization Serv., 502 U.S. 129, 135 (1991). If the statutory language is unambiguous, no further inquiry is necessary to ascertain the meaning of the statute. See Connecticut National Bank v. Germain, 503 U.S. 249, 253-54 (1992); United States v. James, 478 U.S. 597, 606 (1986). Indeed, except in the rare circumstance where there is a "clearly expressed legislative intention to the contrary," the language of the statute "must ordinarily be regarded as conclusive." See James, 478 U.S. at 606 (quoting Consumer Product Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980)); see also United States v. Ron Pair Enterprises, Inc., 489 U.S. 235, 242 (1989); Immigration and Naturalization Serv. v. Cardoza-Fonseca, 480 U.S. 421, 432 n.12 (1987).

7/ In addition to these arguments, the Tribe argues, apparently in the alternative, that the devise of an interest in property within Shawnee Reserve No. 206 to a non-Indian violates Article 10 of the Treaty of 1831. According to the Tribe, Congress guaranteed that the lands covered by the treaty would "never be within the bounds of any State * * * nor subject to the laws thereof." Tribe's Brief at 8 (quoting Treaty with Shawnee, 7 Stat. 355, Art. 10 (1831)). The Tribe contends that the Treaty has never been formally abrogated; that Shawnee Reserve No. 206 is within the lands described by the treaty; and that Shawnee Reserve No. 206 therefore cannot "becom[e] part of non-Indian lands" through the devise by Decedent to his non-Indian wife. Id. at 9.

We disagree. Under the plain language of the Treaty, its terms do not apply to this case. Article 10 of the Treaty restricts the sale or cession by the band or tribe of lands granted to them by the Treaty. Decedent's interests in the lands located within Shawnee Reserve No. 206 are no longer tribally-owned, and transfer of Decedent's interests to his wife would not be a sale or cession by the Tribe. As such, the Treaty does not apply. Moreover, although the Tribe contends that the Treaty as a whole has never been formally abrogated, the Tenth Circuit held that subsequent Congressional acts have abrogated certain rights arising under the Treaty. See Oyler v. Allenbrand, 23 F.3d 292, 298 (10th Cir. 1994) (finding that the Kansas Act, 18 U.S.C. § 3243, extended state criminal jurisdiction to all Indians in Kansas). The present appeal is limited to the disposition of Decedent's property interests — not questions of jurisdiction — and nothing in the Treaty prohibits the devise at issue here.

Here, the Tribe disregards the plain language of sections 2205 and 2206. Subsection 2205(c) does not operate in a vacuum by providing tribes with authority to acquire trust or restricted land devised to a non-Indian, regardless of when the devise took place. Although it is true that subsection 2205(c) does not state when that section takes effect, the language of subsection 2205(c) makes clear that a tribe's ability to acquire trust or restricted land devised to a non-Indian is triggered only when such property is devised under subsection 2206(a). And, as noted above, section 2206 explicitly states that it is does not apply to the estates of decedents who die less than one year after the Secretary publishes the required certification. See 25 U.S.C. § 2206(g)(5). Thus, subsections 2205(c) and 2206(a) are linked, and a tribe cannot invoke subsection 2205(c) to acquire property devised to a non-Indian by a decedent who died prior to the end of this time period. In this case, Decedent died in 1999, before the 2000 amendments were even enacted. Obviously, Decedent's death occurred well before any possible effective date of sections 2205 and 2006. We therefore reject the Tribe's attempt to retroactively apply subsection 2205(c).

Furthermore, we note that Judge Reeh's and the Board's reading of subsection 2205(c), as amended in 2000, is wholly consistent with other provisions in ILCA and with the legislative history and the purposes of the statute. For example, subsections 2205(a) and (b) authorized Indian tribes, subject to the approval of the Secretary, to adopt their own probate codes to govern the descent and distribution of trust or restricted lands without specific enactment by Congress. Subsection (b) specifically provided that an approved tribal probate code would not become effective until 180 days after Secretarial approval or until section 2206 became effective, whichever was later. See 25 U.S.C. § 2205(b)(3). Thus, the language of sections 2205 and 2006 expressly provided that both sections would apply prospectively to the estates of decedents who died after the sections' effective dates. In addition, and contrary to the Tribe's assertion, the legislative history of ILCA makes clear that Congress intended the solution to the problem of fractionated interests in trust or restricted lands to be implemented "gradually," and not "overnight." See H.R. Rep. No. 97-908, at 11 (1982), reprinted in 1982 U.S.C.C.A.N. 4415, 4420.

We therefore conclude that Judge Reeh correctly determined that subsection 2205(c) does not apply to Decedent's estate, and that the Tribe therefore does not have a right to purchase Decedent's fractional interest in Shawnee Reserve No. 206.

Conclusion

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Board affirms Judge Reeh's August 10, 2004 decision denying rehearing.

I concur:

// original signed
Amy B. Sosin
Acting Administrative Judge

// original signed
Steven K. Linscheid
Chief Administrative Judge